Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TIMOTHY MORRISON, PETITIONER

v.

SUMMIT COUNTY SHERIFF'S DEPARTMENT;
RICHARD L. WARREN, SUMMIT COUNTY SHERIFF;
YAMINI ADKINS, HUMAN RELATIONS MANAGER
FOR SUMMIT COUNTY SHERIFF'S DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Sixth Circuit Court of Appeals err in holding that procedural due process is not warranted for persons who -- in the Court's estimate -- "cannot prevail" on the merits of an underlying claim, and are thus not deserving of a full and fair opportunity to be heard even if such a hearing is guaranteed by the Constitution?

2. Is procedural due process "absolute" in terms of affording some sort of hearing to a person deprived or facing deprivation of a constitutional right, as this Court has previously held, or is it "relative" to the individual circumstances and a court's or tribunal's estimate of the underlying merits or perceived "futility" of the individual case, as the Sixth Circuit has now held. In other words, is it proper to conflate the guaranteed "process" with the underlying "merits" of a case?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Timothy Morrison, Petitioner, and Richard Warren, Respondent, as set forth in the case caption. Morrison is an individual and citizen of the United States.

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OPINIONS BELOW

The July 13, 2004, opinion of the United States Court of Appeals for the Sixth Circuit is reported at 375 F.3d 468 (6th Circuit 2004) and is reprinted at Appendix (App.) p.1a. The Sixth Circuit's denial of *en banc* review is reprinted at App. p. 54a. The April 24, 2002 decision by the United States District Court for the Northern District of Ohio is reprinted at App. p. 22a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its denial of *en banc* review on October 18, 2004; the Petitioner petitioned for, and was granted, 60 additional days in which to respond. Petitioner has timely filed this petition within 180 days of October 18, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 42 U.S.C. § 1983.

42 U.S.C. § 1983 provides:

> Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Overview of the Case

The Sixth Circuit panel affirmed the District Court and held that a public employee with a property interest in his employment was afforded adequate procedural due process in an abbreviated post-deprivation hearing, during which the employer, without notice, introduced additional justifications for termination of employment other than those on which the hearing was premised, over the objections of Petitioner. In the arbitrator's written opinion issued some months later, the arbitrator agreed with Petitioner that Petitioner had not been afforded due process for his termination, and the arbitrator reinstated Petitioner with back pay. A paragraph later in the

opinion, the arbitrator then found that Petitioner should be discharged for post-termination conduct, and the arbitrator "re-fired" Petitioner. Petitioner was not afforded another post-termination hearing and was completely taken aback by the second "firing" and alleged basis for it.

The Sixth Circuit court found that Petitioner had been discharged twice (once by the "neutral" arbitrator) and that the hearing that was afforded Petitioner was itself "extremely abbreviated." The Sixth Circuit nonetheless found that the single, abbreviated hearing "adequately served": 1) as a post-deprivation hearing for the original termination of Petitioner, 2) as adequate notice for a second termination, 3) as a pre-termination hearing for the second termination, and 4) as a post-termination hearing for the second termination.

The crux of the Sixth Circuit's conclusion, found in the last four paragraphs of the decision, is that the question of a second pre- or post-termination hearing was moot, because any argument or evidence presented by Petitioner was "futile."[1]

Notably, the Sixth Circuit cited no authority for its conclusion, and none could be found by Petitioner. Thus, this is a case of first impression for this Court, addressing an important application of the Due Process Clause of the Fourteenth Amendment of the Constitution. In addition, the Sixth Circuit's holding is directly at odds with prior

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[1] In fact, Petitioner could have presented evidence, had he had adequate notice and opportunity to be heard on the alleged post-termination conduct, that it was not futile.

holdings of this Court, which state unequivocally that the right to a full procedural process is "absolute" and cannot be disturbed, regardless of the underlying merits or substance of the deprivation(s).

Moreover, the holding would serve as dangerous precedent for the unwarranted deprivation of civil rights under color of state law in other contexts, not just civil, but criminal and military, as well as introducing an unacceptable laxness to procedural rights that are guaranteed to individuals pursuant to the Constitution of the United States.

As argued *infra*, the question in this case is the extent to which the Court's definition of "absolute," with respect to procedural due process, can be diluted by selective applications of the so-called "absolute right" to procedural due process -- in other words, how easily can the Constitution's guarantee of a "full and fair hearing" be trumped in favor of a "futility" argument?

II. Background of the Case

All of the following are findings of the Sixth Circuit Court, based on its reading of the record, as well as the findings of the arbitration at issue. In May 1998 Petitioner Morrison was accused of domestic violence and a Civil Protection Order (CPO) was obtained against him by his wife on May 26, 1998. The CPO did not mention anything about a "zero tolerance policy" of the Sheriff's Office with respect to domestic violence charges against employees -- nor did it mention anything about any of the Sheriff 's reasons for seeking to terminate Morrison's employment. The CPO simply stated that Morrison was prohibited from carrying a firearm.

The Sheriff's Office notified Morrison it was terminating him based on the CPO, because he was unable to perform the essential functions of his job. See the Sixth Circuit's decision at 2-3 (Slip Op.). On the same day the CPO was issued, the Human Resources representative, Yamini Adkins informed Morrison that the Sheriff was aware of the CPO and intended to terminate his employment *based on the CPO* (i.e., because he could not carry a gun, he could not serve as an officer). Consequently, the arbitrator found, the Sheriff's notice was constitutionally deficient as well as a violation of the collective bargaining agreement (CBA) between the Sheriff's Office and the bargaining unit -- in other words, the Sheriff blatantly failed to give proper notice and an opportunity to be heard at the pre-deprivation hearing. In addition, despite being on notice that Morrison was moving to vacate the CPO, the Sheriff's Office held a hurried and truncated pre-termination hearing the next day, "found" that the termination was justified and upheld Morrison's firing.

In late May or early June 1998, Morrison informed the Sheriff's Office of a pending hearing on the motion to vacate the CPO, scheduled for June 3. Despite this information (or because of it), the Sheriff's Office and Summit County Prosecuting Attorney on June 3, stated that, regardless of the pending hearing, the CPO was still in effect and the firing was upheld because Morrison was allegedly "not able to fulfill the requirements of the position." The Magistrate in the CPO hearing granted the motion to vacate the CPO on June 8, 1998, finding the accusations to be unfounded. Yet, the Sheriff's Office did nothing. Meanwhile, the arbitration was scheduled for

the following March.[2]

On July 2, 1998, the former Mrs. Morrison again falsely accused Morrison of domestic violence. It is undisputed that the Sheriff's Office was aware of this second charge at the time, just as it had become immediately aware of the first charge. With respect to the second charge, Morrison pleaded "no contest" to a reduced charge of "Disorderly Conduct," a minor misdemeanor, on September 10, 1998. At the time the decision was carefully thought out. Despite the fact that the underlying accusation was again false, pleading to the misdemeanor would not affect his ability to carry a gun and perform his duties as a police officer (the sole reason for discharging him), and he could ultimately have it expunged.

Despite having knowledge of the second charge, the Sheriff's Office did nothing; they merely waited for the arbitration in March 1999, over eight months later. Morrison arrived at the arbitration with his union attorney, and witnesses lined up, ready to argue that the CPO was inaccurate, and that other similarly situated officers who had had similar CPOs against them were given administrative positions pending the outcome of the CPOs (hence, one could still perform the essential job functions with accommodation). In addition, the

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[2] As noted by the arbitrator and established in the record, Morrison's former wife, Jade Morrison, had a history of false accusations against deputy sheriffs and police officers whom she had a penchant for dating. She could substantiate virtually none of her claims, which were rebutted by evidence in most cases, and the arbitrator even noted her lack of credibility in rendering its initial decision to reinstate Morrison.

arbitration was to be truncated, since the CPO and sole reason for discharge had already been vacated.[3]

At the "extremely abbreviated" arbitration, the Sheriff's Office abandoned its original arguments predicated on the CPO -- the very reason for the arbitration -- and ambushed Morrison with the new claim that the Sheriff's Department had a new and unwritten "zero-tolerance policy" towards complaints of domestic violence by spouses of employees and that, even if the original reason for firing Morrison was bogus, the "zero tolerance policy" applied subsequent to his termination "justified" firing him. The problem was that the conduct being tried at the hearing occurred *after* the conduct and termination on which the hearing was based.

The arbitrator rendered his decision four months after the hearing. The arbitrator ultimately found that the first "notice" and pre-deprivation hearing was inadequate and thus violated due process, since the employer never actually notified Morrison of the reasons for discharge but relied only on the CPO, which was not even generated by the Sheriff's Office. As such, the arbitrator found the discharge to be premature and incorrect, and ordered Morrison to be reinstated with backpay through September 1998.

However, the arbitrator went on, during the same transaction, to hold that the second charge against Morrison (while an unemployed individual) "justified" termination and ordered Morrison to be terminated as of

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[3] The entire arbitration lasted only two days, which the Sixth Circuit panel found to be "extremely abbreviated." Slip Op. at 16.

September 29, 1998. In essence, the arbitrator reinstated Morrison and then fired him in a single transaction and based on alleged "conduct" and an unsupported "zero-tolerance policy" which were beyond the scope of the hearing itself.[4]

On appeal, the Sixth Circuit found for Morrison on nearly all of his issues of law. However, the Court ultimately affirmed the judgment of the trial court on two lone bases: First, because the Sheriff had testified (without any evidentiary support or notice) there was a "zero-tolerance policy" with respect to "mere accusations" of domestic violence, then Morrison's discharge was "justified" by conduct that allegedly occurred after his termination from the Sheriff's Department. Second, where an employee is afforded a hearing on the original termination, whether that hearing actually centers around other alleged conduct is irrelevant as long as it can be held, on the merits, that the alleged later conduct "justified" the original termination.

According to the Sixth Circuit,

> . . . Morrison's property interest in his continued employment was not subject to any risk of erroneous deprivation through the procedures used. His Disorderly Conduct conviction, based on charges of

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[4] The Court never addressed what basis or authority the arbitrator -- an independent party and not a Summit County Sheriff's Office employee -- had to "fire" Morrison after he ordered Morrison's reinstatement. However, the Court did find that the reinstatement and subsequent re-firing of Morrison comprised two independent actions.

> domestic violence, required his discharge under the Sheriff's Office's "zero-tolerance policy;" neither reinstatement nor additional recovery was possible. **As to the third factor, additional procedural safeguards would provide no value:** again, Morrison's conviction required his discharge, and nothing that a second hearing would provide could avoid that outcome. . . .
>
> The interests in efficiently employing safe and effective public safety officers are not outweighed by Morrison's futile interest in reinstatement or additional recovery, particularly when he has already been convicted and the conviction requires his discharge. Therefore, the abbreviated process, in our view, constitutes a sufficiently meaningful opportunity to satisfy due process requirements. . . .
>
> We hold that Morrison had plenty of time during the arbitration -- two full days, in fact -- to know of and rebut the second charge against him. Under the specific facts of this case, we conclude that the arbitration sufficiently incorporated all of the due process safeguards that the Constitution requires, and Morrison suffered no due process violation.

Morrison v. Warren, 375 F.3d 468, 476 (6th Cir. 2004), Slip Op. 18-20 (emphasis added).

The Sixth Circuit's decision permitted the alleged (and admittedly truncated) "merits" of the particular issue to trump the inherent validity of the underlying *process*, guaranteed by the Constitution, for reaching and weighing the merits. This flies in the face of Constitutional Law and all of the prior precedents of this Court designed to safeguard the integrity of the "procedural" and "process" meanings inherent in the term "procedural due process."

REASONS FOR GRANTING THE PETITION

The instant case presents a question of first impression for this Court, and also requires certiorari to ensure that lower courts properly apply the due process procedure guaranteed by the Constitution, as well as to ensure that courts do not confuse the meaning of "process" and "procedure" with "merits" when applying the law.

I. Review of this case is warranted because this is a question of first impression before the Court, and the Court's intervention is necessary to preserve the integrity of its prior holdings and constitutional interpretations of due process.

Throughout the centuries, this Court has been watchful to preserve the integrity of constitutional guarantees by preserving the integrity of the process by which these guarantees may be removed or withdrawn.

This Court has held that procedural due process is an "absolute right" where it can be shown that there is a

property or liberty interest and that due process is warranted.[5] In *Carey v. Piphus*, 435 U.S. 247, 266-267 (1978), this Court discussed the absoluteness of due process procedural guarantees in terms of possible damages to be awarded, stating:

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

Id. The *Carey* holding made clear that, even if the underlying merits are dubious, a person is entitled to due process -- the *procedure* of adequately examining and determining the merits. *See, also, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544 (1985) ("the right to a hearing does not depend on a demonstration of certain success"). This does not mean being ambushed by completely new and different evidence and justifications for termination in the midst of an "abbreviated" hearing.

Moreover, "[a] fundamental requirement of due process is the 'opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*,380 U.S. 545, 552 (1965). A person whose interests are in

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[5] It is undisputed that Petitioner had a property interest in his public employment with Respondent.

jeopardy "must have adequate notice of the charges and a chance to inspect the evidence to be introduced." *Scheiner v. New York Health and Hospitals Corp.*, 1999 U.S. Dist. LEXIS 15028 *20. Facially adequate procedures must be realized in practice to satisfy due process. *Id. See, also, Carter v. Western Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985) (abbreviated pre-termination hearing requires a second, more meaningful post-termination hearing wherein the person may attend, have counsel, call witnesses, "and to know and have an opportunity to challenge the evidence against him").

The instant case is particularly excellent for testing the strength and integrity of the Court's definition of the purported "absoluteness" of procedural due process. Does "absolute right" of any due process proceeding in this Court's interpretation mean "relative to the circumstances," and permit dilution in based on potential or perceived futility or lack of merit, or does it mean that the process, and being afforded a meaningful hearing for determining the merits of a case *is itself unassailable and absolute*, and applied just like any other constitutional procedural process?

Ironically, Morrison can prove -- and could have proved at a prior hearing had he been given proper notice and a full and fair opportunity to respond -- that there was, in fact, no uncodified "zero-tolerance policy" at the Sheriff's Department. He also could have proved, if given adequate notice, that similarly situated persons had been retained by the Sheriff's Department even after pleading "no contest" to the same charge under identical circumstances. In other words, either there actually was no unwritten, unspoken "zero-tolerance policy," or the

"policy," if it existed, was *selectively applied* by the Sheriff and thus was not "zero tolerance" at all. In short, the dismissal of Morrison did not turn on the objective fact that he pleaded "no contest" to disorderly conduct, but on whether there truly was a "zero-tolerance" policy that precluded his being retained.[6] However, he was not even informed about the existence of a so-called policy until the middle of the hearing. Moreover, the "policy" turned solely on the Sheriff's self-serving testimony; there was no written policy, no other tangible item illustrating such a policy, and no corroborating testimony about such a policy. The only way Morrison could have assailed the policy is to point to instances where it was not applied. Had he been given adequate time to prepare, he could have done just that.

Regardless, the policy introduced by the Sheriff at the hearing and relied on by both the arbitrator and the Sixth Circuit court, was in fact a fiction. Moreover, just as "zero tolerance" is by definition an absolute, the guarantee of a proper due-process hearing is likewise absolute. *Carey*, 435 U.S., 266-267. But either concept applied selectively is nothing but a contradiction.

II. Review is warranted to ward off confusion in the lower courts and ensure even application of constitutional due process guarantees.

This Court's answer to the questions posed by Petitioner will be of the utmost importance in guiding the lower courts when determining due process questions. In

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[6] See *Loudermill*, 470 U.S. at 544 n.9, finding similarly with respect to factual plausibility of Loudermill's defense.

short, if a lower court believes that, under the particular circumstances, full due process is unnecessary because the person to whom it is afforded is adjudged to be "unworthy" on the merits prior to the actual process, then the court can feel justified in meting out punishment without the encumbrances of constitutional provisions altogether.

The Sixth Circuit court improperly conflated "process" with the underlying "merits of a case" and made a summary decision that some persons are not entitled to a full due process review, be it pre- or post-deprivation, or (as in this case) both. The decision is without evidentiary support or precedential authority. If allowed to stand, this decision will likely serve as precedential authority, and would justify using a definition of "due process" as flexible and insubstantial as any individual set of circumstances. It would justify ambushing a person in the midst of a hearing with a new basis for termination than that of which the person had notice and was prepared to address. It would even justify suspending due process altogether based on a court's arm's-length view of incomplete facts from a cold record and perception of a hearing's "futility."

Petitioner's position is that such a result would be repugnant in any democratic and free society, particularly this one which enjoys such a rich heritage of protections for individual property and liberties. Only this Court can undo the precedent and subsequent mischief the Sixth Circuit's reported decision may cause with regard to future decisions.

CONCLUSION

The petition for a writ of certiorari should be granted. The Sixth Circuit opinion conflicts with the solid body of law established by this Court and followed by other Circuit courts. In addition, the opinion is likely to set a dangerous precedent that it is permissible to erode the meaning of "due process" and adjudge whether it is warranted by weighing the underlying merits of a person's termination or a public employer's justification for it. For these reasons, this Court should reverse the Sixth Circuit and remand for further proceedings.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 02-3672

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY MORRISON,
Plaintiff-Appellant,

v.

RICHARD L. WARREN, et al.,
Defendants-Appellees.

January 28, 2004, Argued
July 13, 2004, Decided
July 13, 2004, Filed

COUNSEL: ARGUED: Dennis R. Thompson, THOMPSON LAW OFFICES, Akron, Ohio, for Appellant.

Susan Baker Ross, SUMMIT COUNTY PROSECUTOR'S OFFICE, Akron, Ohio, for Appellees.

ON BRIEF: Dennis R. Thompson, THOMPSON LAW OFFICES, Akron, Ohio, for Appellant.

Sandy J. Rubino, SUMMIT COUNTY PROSECUTOR'S OFFICE, Akron, Ohio, for Appellees.

JUDGES: Before: MARTIN, RYAN, and MOORE, Circuit Judges.

OPINION BY: BOYCE F. MARTIN, JR.

OPINION:

BOYCE F. MARTIN, JR., Circuit Judge. Timothy Morrison, former Deputy Sheriff of Summit County, appeals the district court's grant of summary judgment to Sheriff Richard Warren and Human Relations Officer Yamini Adkins, both of the Summit County Sheriff's Office. Morrison claims that procedures culminating in his discharge from the police force violated his Fourteenth Amendment procedural due process rights.

I

Former Deputy Sheriff Morrison was accused of domestic abuse by his wife, Jade Morrison, who requested and obtained a Civil Protection Order against him on May 26, 1998. The Order, which would become permanent after fourteen days absent any objection, prohibited Morrison from possessing, using, carrying, or obtaining any deadly weapon for up to five years. As a result, Morrison was unable to satisfy his primary job requirement to carry a gun and was discharged from the force.

Yamini Adkins initiated the discharge process in a May 26 telephone conversation with Morrison in which she informed him that she was aware of the Civil Protection Order. Later that day, she sent Morrison a letter stating that he would be placed immediately on

Administrative Leave, and instructing him to report to a pre-discharge hearing the following day. In an effort to save his job, Morrison filed a motion in state court to stay and vacate the Civil Protection Order.

At the May 27 hearing, Adkins explained the consequences of the Civil Protection Order--i.e., discharge--and notified Morrison that a pre-discharge conference would be held the following day. Adkins did not supplement her oral statements with written specifications as to the grounds for Morrison's discharge.

At the pre-discharge conference, which was administered by a neutral prosecutor, Morrison was asked to explain the circumstances surrounding the Civil Protection Order. Morrison presented a copy of his motion to stay and vacate the Order and indicated that the magistrate had scheduled a hearing on the motion for June 3. Morrison then requested to postpone the pre-discharge conference until after the magistrate ruled on the motion. His request was denied and it was acknowledged that, despite the motion, the Order was currently in effect. Morrison was then presented with a letter, dated May 28, 1998, from Sheriff Warren, stating: "in view of the current Domestic Relations Order, you are removed from your position of Deputy Sheriff." At the conclusion of the hearing, the prosecutor issued a finding of just cause and Morrison's discharge went into effect on May 28.

Morrison challenged his discharge, and a post-discharge arbitration was scheduled for March 17 and 18, 1999, pursuant to the terms of the collective bargaining agreement between the employees' union and the

Summit County Sheriff's Office. Union members, including Morrison, were subject to the agreement, but only the union could exercise a member's rights in employment disputes. As a result, the union, not Morrison, represented Morrison's case in his discharge hearings. Also, the union, not Morrison, had standing to challenge the prosecutor's finding of just cause in state court. The union declined to make that challenge.

During the period between the pre-discharge hearing and the March 1999 arbitration, the magistrate vacated the Civil Protection Order. This did not affect Morrison's discharge, however, and the arbitration remained scheduled. During the pendency of the arbitration, Morrison was charged on July 2, 1998, with additional acts of domestic violence against Jade Morrison and, pursuant to a plea agreement, pleaded "no contest" to a reduced charge of Disorderly Conduct on September 10, 1998.

At the two-day arbitration the following March, the arbitrator framed the issue as follows: The question to be resolved is whether the Sheriff violated the collective bargaining agreement when it terminated [Morrison], and if so, what should the remedy be? The Sheriff's Office acknowledged that the Civil Protection Order--the basis for Morrison's discharge--had been vacated. Nonetheless, it argued that Morrison's discharge was required under the Office's "zero-tolerance policy" for domestic abuse. n1 As evidence, the Sheriff's Office submitted Morrison's July 2 charge and September 10 conviction for Disorderly Conduct.

The arbitrator then engaged in a lengthy analysis of whether the evidence of Morrison's Disorderly Conduct

conviction--which occurred after his discharge--should be admitted to justify a second discharge. The arbitrator concluded that although post-discharge conduct is not ordinarily admissible or relevant in making a just cause determination, Morrison's post-discharge conduct fell into a narrow exception recognized in arbitration precedent that allows the admission of post-discharge conduct that is "part of one connected whole." The arbitrator found that because both the Civil Protection Order and the conduct were rooted in Jade Morrison's allegations of domestic abuse, he would consider evidence of Morrison's post-discharge conduct.

On July 30, 1999, the arbitrator issued a 43-page decision denying in part and sustaining in part the union's position. The arbitrator first found that because the Civil Protection Order had been vacated, the May 28 discharge was invalid. However, the arbitrator also found that "the Sheriff is justified in not returning [Morrison] to its employ," because Morrison's discharge was justified by his post-discharge conduct, stating:It would be a serious problem for the Sheriff if [Morrison, upon reinstatement while subject to the conviction] were to violate his probation . . . and have to be locked up with some of the criminals he arrested. Such a reasonably foreseeable situation is intolerable and supports a finding that just cause exists for . . . termination. The arbitrator awarded Morrison back pay from May 28, 1998 (the date of his "premature" discharge), to July 2, 1998 (the date upon which the domestic violence charge was filed). Fashioning a remedy similar to that provided in section 10.4 of the collective bargaining agreement, the arbitrator also decided that Morrison should be treated as if he were

on leave with vacation pay for the period between July 2, 1998, to September 10, 1998 (the date of his conviction). Finally, the arbitrator held that Morrison's discharge was effective on September 10, 1998.

Morrison, without support from the union, instituted an action in state court to appeal the arbitrator's award. The state court ruled that Morrison had no standing to bring this claim under the collective bargaining agreement, which gives exclusive rights to the union to appeal an arbitrator's award. The state court's judgment was affirmed on appeal.

Morrison then filed an action in federal district court, claiming, among other things, that the Sheriff's Office violated his procedural due process rights by failing to provide these processes:(1) adequate notice of the pre-termination hearing of May 28, 1998;

(2) any notice or pre-termination hearing relating to discharge based on his post-discharge conduct; and

(3) any review of the arbitrator's decision relating to his post-discharge conduct. As to the first claim, the district court ruled that Morrison received sufficient oral notice of the May 28 hearing. With regard to second claim, the district court ruled that Morrison failed to "explain how the post deprivation procedures set forth in the collective bargaining agreement" do not satisfy the process requirements vis-a-vis the post-discharge conduct. On the third claim, the district court found that it was not permitted to review the substance of the arbitrator's award and that it was satisfied that the arbitrator "carefully considered whether Morrison's post-termination conduct was properly before him in

determining the propriety of Morrison's discharge, and set forth numerous reasons for its inclusion."

For the reasons discussed below, we agree that oral notice was sufficient. As to Morrison's other contentions, however, more consideration than the district court provided is due. The district court cut short its due process analysis because it found that Morrison was requesting substantive review of the arbitrator's award. We disagree with this finding. Rather than seeking substantive review, Morrison is claiming that the admission of his post-discharge conduct lacked procedural safeguards--e.g., notice and an opportunity to contest the evidence. Morrison contends that he was not able to argue his case because he was taken by surprise by evidence of a new charge; this contention raises at least a colorable claim of denial of due process. See Carter v. Western Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985) (grievant's claim that he was denied the right to argue his case before the decision makers raises at least a colorable claim of denial of due process). Because Morrison's claims implicate fundamental due process issues under the Fourteenth Amendment, we now consider them.

II

A. Standard of Review

We engage in a de novo review of the district court's grant of summary judgment. Buckner v. City of Highland Park, 901 F.2d 491, 494 (6th Cir. 1990). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This motion for summary judgment involves no disputed issue of fact; thus, we must decide whether, as a matter of law, Morrison was afforded due process. In doing so, we view the evidence and draw all reasonable inferences in favor of Morrison, as the nonmoving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1161 (6th Cir. 1988).

B. Waiver of Section 1983 Claim

Sheriff Warren and Adkins characterize this appeal as Morrison's attempt to "effect a substantive review of the arbitrator's [award]" that was waived as a result of the union's decision not to appeal it. Sheriff Warren and Adkins argue that parties who contractually agree to binding arbitration, as Morrison has here, waive judicial review except over the determination of "whether there is a rational nexus between the collective bargaining agreement and the [arbitrator's] award, and whether the arbitrator was corrupt or committed gross procedural improprieties." Appellee's Br. at 9 (citing Cuyahoga Cmty. Coll. v. Dist. 925, Serv. Employees Intern. Union, AFL-CIO, 42 Ohio App.3d 166, 167, 537 N.E.2d 717 (Ohio App. 8th Dist. 1988)).

This argument fails for two reasons. First, Morrison is not requesting a substantive review of the arbitrator's award; rather, he asks this Court to consider whether the evidence of his post-discharge conduct was used in accordance with due process requirements. Due process

requires notice of the charges and a meaningful opportunity to contest the evidence. See Carter, 767 F.2d at 273 (at a minimum, procedural due process requires that the discharged employee be permitted to call witnesses and produce evidence on his own behalf, and to know and have the opportunity to challenge the evidence against him). Thus, if evidence is admitted to support a new charge for which an employee was given no notice and had no time to prepare, the employee is entitled to assert in federal court a claim for violation of due process. Because Morrison claims that his procedural due process rights were violated when, to his surprise, evidence was admitted to support a new charge--which ultimately was the basis for his discharge--judicial review is appropriate.

Second, the arbitration clause in the collective bargaining agreement lacks the clear and unmistakable language that is necessary to waive procedural due process rights, and thus cannot be interpreted to waive Morrison's ability to assert those rights. See Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 78-79, 142 L. Ed. 2d 361, 119 S. Ct. 391 (1998) (waiver of union members' federal statutory rights in a collective bargaining agreement must be "clear and unmistakable"); Ciambriello v. County of Nassau, 292 F.3d 307 (2nd Cir. 1991) (binding arbitration clause in collective bargaining agreement did not waive the employee's Fourteenth Amendment procedural due process right because it lacked "clear and unmistakable language"). The only reference to waiver in Morrison's arbitration clause relates to the Sheriff's Office's disciplinary procedures, not the Fourteenth Amendment. The clause states: Failure to elect and pursue one of these three options [appear at the

hearing; appear at the hearing with counsel; or elect in writing to waive the hearing opportunity] will be deemed a waiver of the employee's rights to disciplinary hearings.Thus, neither the arbitration agreement nor any actions or omissions pursuant to that agreement waives Morrison's ability to file a Section 1983 procedural due process claim. His claims are properly before us.

C. Procedural Due Process

To resolve procedural due process issues, we engage in a two-step analysis. Johnston-Taylor v. Gannon, 907 F.2d 1577, 1581 (6th Cir. 1990). We initially determine whether a protected property interest exists and then determine what procedures are required to protect that interest. Id. Because Morrison's property interest in his continued employment is undisputed, we move to the second step.

1. Pre-termination Process

The Supreme Court has held that an employee who has a protected property interest in continued employment is entitled to a pre-termination hearing, but that the pre-termination hearing need not be elaborate. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Morrison claims that the Sheriff's Office violated his procedural due process right to a meaningful pre-termination hearing by neglecting to provide written notice of the specific charges against him. Yet the Court determined in Loudermill that "the tenured public employee is entitled to oral or written notice of the charges against him." Id. at 546 (emphasis added). The oral notice

provided by Adkins to Morrison--that he would be discharged as a result of his inability to carry a gun due to the Civil Protection Order--was sufficient.

Procedural due process also requires "an explanation of the employer's evidence and an opportunity for the employee to present his side of the story." Id. at 542. The Sheriff's Office also satisfied this requirement. Adkins explained that the charge was based on the Civil Protection Order; then she scheduled a pre-termination hearing for May 28, at which Morrison made an informed presentation. Inasmuch as Morrison received notice of the charge against him and was afforded an opportunity to rebut it, the pre-termination hearing satisfies constitutional requirements. See id.

2. Post-termination Process

In Morrison's post-termination arbitration, the arbitrator held that the Sheriff's Office prematurely discharged Morrison, but that it was justified "in not returning [Morrison] to its employ" based on his post-discharge domestic violence charge and related conviction. The parties give differing characterizations of the arbitrator's ruling. While the Sheriff's Office argues that the arbitrator considered Morrison's post-discharge conduct only to construct an appropriate remedy for the invalid discharge, Morrison contends that the arbitrator, rather than constructing a remedy, found a distinct justification for a second, valid discharge. We agree that Morrison suffered a second discharge. However, in this context our characterization of the arbitrator's award is irrelevant. Under either characterization, Morrison held a property interest in his employment from the moment

his initial discharge was deemed invalid--conceptually, when a discharge is deemed invalid, the property interest was never lost. Therefore, he deserved all the protections that procedural due process requires for the deprivation of a property interest, whether that deprivation is characterized as a discharge or a failure to reinstate.

An essential principle of due process is that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Although the formality and procedural requisites for the hearing can vary, "depending upon the importance of the interests at stake and the nature of the subsequent proceedings," Loudermill, 470 U.S. at 545 (quoting Boddie v. Connecticut, 401 U.S. 371, 378, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)), the fundamental requirement of procedural due process is that an individual be given an opportunity to be heard at a meaningful time and in a meaningful manner, Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). At the least, this requires notice of the charges and an opportunity to view and contest the evidence supporting them. Loudermill, 470 U.S. at 546. Such notice must be reasonably calculated, under the circumstances, to apprise the interested parties of the pendency of an action and afford them an opportunity to present their objections. Carter, 767 F.2d at 273.

Morrison's arbitration, which amounted to a post-deprivation hearing on his first discharge and both the pre-and post-deprivation hearings for his second discharge, was extremely abbreviated in terms of

satisfying due process for the second discharge. Morrison, anticipating a hearing on his original discharge, instead became aware--only at the arbitration--that he would be discharged on the basis of the domestic violence charge. Under the procedures set forth in the collective bargaining agreement, and in the absence of the first, invalid discharge, Morrison would normally get an opportunity, pursuant to the collective bargaining agreement, for pre- and post-discharge hearings on the domestic violence charge. Thus, we must determine whether the abbreviated process that he received satisfies due process requirements.

Sheriff Warren contends that it does, arguing that where the grievant is aware of his post-discharge conduct (and the consequential charge and conviction), oral notice-even if only provided at the arbitration hearing-of the intent to submit the domestic violence charge is sufficient to satisfy due process requirements. The Sheriff states: [Morrison] can hardly argue that he was surprised when he received notice that his former employers intended to introduce evidence of the subsequent conviction. [Morrison] argues in his brief that evidence of this charge was presented at his post-deprivation hearing-he does not, nor can he allege, that he was not given an opportunity to respond to the evidence during the two-day arbitration.

We recognize that abbreviated process may be justified in some circumstances. Whether it is justified here depends on our application of the constitutional balancing test set forth in Mathews, 424 U.S. at 335. The four Mathews factors are: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the

procedures used; (3) the probable value, if any, of additional or substitute procedural safeguards; and (4) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id.

With regard to the first two factors, Morrison's property interest in his continued employment was not subject to any risk of erroneous deprivation through the procedures used. His Disorderly Conduct conviction, based on charges of domestic violence, required his discharge under the Sheriff's Office's "zero-tolerance policy;" neither reinstatement nor additional recovery was possible. As to the third factor, additional procedural safeguards would provide no value: again, Morrison's conviction required his discharge, and nothing that a second hearing would provide could avoid that outcome.

Finally, with regard to the government's interest, there is an undeniable argument in favor of upholding the abbreviated process. The employee was a Deputy Sheriff charged with protecting the citizens of Summit County. The government interest in effective law enforcement is extremely high and the need to speedily replace public safety officers who are convicted of crimes is obvious. Buckner, 901 F.2d at 497 (quoting Loudermill, 470 U.S. at 546). The interests in efficiently employing safe and effective public safety officers are not outweighed by Morrison's futile interest in reinstatement or additional recovery, particularly when he has already been convicted and the conviction requires his discharge. Therefore, the abbreviated process, in our view, constitutes a sufficiently

meaningful opportunity to satisfy due process requirements.

There remains the question of whether Morrison should have been afforded notice and an opportunity to contest the domestic violence charge at some time prior to the arbitration. We hold that Morrison had plenty of time during the arbitration--two full days, in fact--to know of and rebut the second charge against him. Under the specific facts of this case, we conclude that the arbitration sufficiently incorporated all of the due process safeguards that the Constitution requires, and Morrison suffered no due process violation.

III

For the foregoing reasons, we AFFIRM the judgment.

Footnotes

n1 During the arbitration hearing, the Sheriff introduced testimonial evidence that "a criminal charge of domestic violence against [the Sheriff's Office's] employees will result in a finding of 'conduct unbecoming' that will always justify immediate discharge without resort to the progressive disciplinary policy. . . ." J.A. at 81.

CASE NO. 5:00 CV 1341
JUDGE DAN AARON POLSTER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TIMOTHY MORRISON,
Plaintiff,

vs.

RICHARD WARREN, et al.,
Defendants.

MEMORANDUM OF OPINION AND ORDER

Before the Court is Plaintiff's Motion to Alter or Amend Judgment Pursuant to Civil Rule 59(e) (the "Motion") (ECF No. 43). For the following reason, the Motion is DENIED.

A motion to alter or amend judgment may be granted only if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. GenCorp, Inc. v. Am. Int'l Underwriters, 178 F.3d 804, 834 (6th Cir.1999) (citations omitted). The Motion rests on what Morrison perceives to be a clear error of law by this Court.

The only claims addressed on the merits by Morrison in his summary judgment motion were his state and federal procedural due process claims. Morrison argued on summary judgment that his procedural due process rights were violated because he did not receive

adequate predeprivation process prior to his May 28, 1998 termination. The Court concluded that the undisputed facts showed that he did in fact receive constitutionally adequate predeprivation process because he had advance oral notice of the pre-termination hearing, he was advised of the reason for the termination (the existence of a CPO), and he had an opportunity to respond. Morrison does not challenge this conclusion. fn1

Morrison employs this post-judgment motion to reiterate his position that he was deprived of due process because (1) the Sheriff did not give him advance notice that he would attempt to introduce evidence of Morrison's post-termination arrest and conviction in the course of the arbitration proceedings; (2) the arbiter improperly considered Morrison's post-termination conduct in determining whether Morrison's discharge was justified, and (3) the arbiter improperly decided that Morrison's discharge was justified based on this evidence.

As the Court noted in its memorandum of opinion and order, the arbiter gave due consideration to whether evidence of Morrison's post-termination arrest and conviction were properly before it and decided they were, setting forth numerous bases for inclusion of this evidence – after which the arbiter concluded that Morrison's post-termination conduct justified his discharge. See ECF No. 37, at 14. The Court stated:

Whether that decision was correct or incorrect is not for this Court to decide, and does not render the process inadequate. Conversely, adequacy of process does not guarantee a favorable decision on the merits.

Id. In other words, even if Morrison is right that the arbiter incorrectly admitted this evidence and relied on it in arriving at its decision, that still does not translate into a due process claim. Morrison cannot use a due process action in federal court to gain judicial review of the arbiter's decision. fn2

Morrison also reiterates his position that he received constitutionally inadequate process because he was unable to obtain state court review of the arbiter's decision. This issue was raised and resolved on summary judgment:

Morrison also contends that the procedures are inadequate because there was no judicial review of the arbiter's decision that his discharge was justified based on his post-termination conviction. It is undisputed that his union could have appealed that part of the arbiter's decision to the common pleas court, but chose not to. While Morrison might have a claim against the union for failure to adequately represent him, such does not translate into a violation of constitutional due process.

ECF No. 37 , at 14-15.

Finally, Morrison has employed his post-judgment motion to engage the Court, for the first time, in a discussion of the application and inadequacy of Ohio's statutory postdeprivation procedures vis-a-vis Morrison.3 ECF No. 43, at 5-9. However, he cannot use a Rule 59(e) motion to argue legal theories not previously raised and, as the Court earlier noted, "[T]he Sixth Circuit has ruled that the state-mandated postdeprivation procedures are sufficiently meaningful

to pass constitutional muster." ECF No. 37, at 14 (citing Collyer v. Darling, 98 F.3d 211, 227-28 (6th Cir. 1996)).

Accordingly, because he has not shown a clear error of law, newly discovered evidence, an intervening change in controlling law impacting his case or manifest injustice, Plaintiff's Motion to Alter or Amend Judgment Pursuant to Civil Rule 59(e) (ECF No. 43) is hereby DENIED.

IT IS SO ORDERED.

/s/ Dan Aaron Polster 5/29/02

Dan Aaron Polster
United States District Judge

Footnotes

fn1 Morrison does continue to argue in his post-judgment motion, however, that the allegations of his ex-wife which formed the basis of the CPO were false and she later dismissed the charges. Neither the veracity of his wife's allegations nor the fact that she later dismissed the charges is relevant to the issue of whether he received constitutionally adequate due process.

Morrison also disputes whether he was ever prohibited from carrying a firearm by the CPO asserting, "The process for a CPO is hardly a thorough process." Motion, at 9. There can be no question that the CPO, however temporary, prohibited Morrison from carrying a firearm.

In any event, whether the Sheriff made the correct decision in deciding to fire Morrison is not germaine to whether Morrison received adequate due process.

fn2 Morrison argues that the Court should alter or amend its judgment because of the Court's comment:

If Morrison felt that the Sheriff's Department violated the CBA by failing to give him advance notice, prior to the arbitration hearing, that it would rely upon the September 10, 1998 conviction as a basis for termination, Morrison could have filed a new grievance under the CBA.

ECF No. 37, at 14. According to Morrison, nothing in the record supports the Court's "sua sponte contention" that he could file a new grievance. ECF No. 43, at 3. In evaluating the cross motions for summary judgment, the Court reviewed the CBA which was in fact part of the record. ECF No. 24, Adkins Affidavit, Exh. 1. In doing so, the Court did not discern any language therein that prevented Morrison from filing a new grievance. Moreover, defendants asserted that Morrison could have filed a new grievance based on his September 10, 1998 discharge, ECF No. 32, at 3, an assertion that Morrison did not challenge in the reply brief he filed more than two weeks later. See ECF No. 34.

fn3 It was the Court that first mentioned the availability of state procedures in its memorandum of opinion and order:

The CBA's grievance procedures culminate in binding arbitration. In Ohio, when a collective bargaining

agreement provides for final, binding arbitration of all grievances, the parties are generally restricted to that procedure. O.R.C. 4117.10, Ste. Marie v. City of Dayton, 109 F.Supp.2d 846, 852 (S.D. Ohio 2000) (citing Cook v. Maxwell, 57 Ohio App.3d 131, 134 (1989)). Parties to the arbitration may appeal the arbiter's decision to the appropriate state court under O.R.C. 2711.10. See, e.g., City of Portsmouth v. International Ass'n of Fire Fighters, Local 512, 139 Ohio App.3d 621 (2000); Wilson v. Toledo Bd. Of Educ., No.-L-85-425, 1986 WL 11389 (Ohio App. Dist. 6, Oct. 17, 1986). Where a collective bargaining agreement does not give a state employee the right to proceed to final and binding arbitration, the employee may avail himself of state civil service remedies and judicial review in state court. O.R.C. 4117.10; Sutton, 958 F.2d at 1345-46; Ste. Marie, 109 F.Supp.2d at 852-53. Morrison does not explain how the postdeprivation procedures set forth in the CBA are inadequate, and the Sixth Circuit has ruled that the state-mandated postdeprivation procedures are sufficiently meaningful to pass constitutional muster. Collyer, 98 F.3d at 227-28.

ECF No. 37, at 13-14.

CASE NO. 5:00 CV 1341
JUDGE DAN AARON POLSTER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TIMOTHY MORRISON,
Plaintiff,

vs.

RICHARD WARREN, et al.,
Defendants.

MEMORANDUM OF OPINION AND ORDER

Before the Court are cross-motions for summary judgment: Motion for Summary Judgment filed by Defendants ("Defendants' Motion" or "Defts' Motion") (ECF No. 21) and Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion" or "Pltf's Motion") (ECF No. 25). For the following reasons, Defendants' Motion is GRANTED and Plaintiffs' Motion is DENIED.

I. FACTS

On May 14, 1998, plaintiff Timothy Morrison's then-wife, Jade Morrison, obtained a Temporary Protective Order ("TPO") against him. fn1 Appendix to Pltf's Motion, ECF No. 28 (hereafter "Pltf's Exh."), A. The TPO prohibited Morrison, a Sheriff's deputy, from carrying "any deadly weapon." Id. ¶ 9. As a result of the TPO, the Sheriff assigned Morrison to jail duty. Pltf's Exh. B.

On May 20, 1998, Magistrate Bernard Schwartz of the Summit County Domestic Relations Court conducted a hearing at which the Morrisons and their attorneys were present. Pltf's Exh. C. The Magistrate expressly found that Timothy Morrison "struck [Jade Morrison] and caused her damage under her right eye. In addition, on or about May 13, 1998, [Timothy Morrison] grabbed [Jade Morrison] by the arm and threw her to the ground." Id. As a result, the Magistrate issued a Civil Protective Order ("CPO") that prohibited Morrison from possessing, using, carrying or obtaining any deadly weapon for a period of five years "unless earlier modified, vacated, or extended by order of this court." Id. ¶¶ 7, 11.

On May 26, 1998, Morrison was told to report the next day to the office of defendant Yamini Adkins, then-Director of Personnel for the Sheriff's Department. ECF No. 28, Morrison Affidavit (hereafter "Morrison Aff.") ¶¶ 8-10. On May 27, 1998, Adkins presented Morrison with a copy of the CPO and instructed him to be present at a termination conference set for May 28, 1998. Morrison Aff. ¶ 11. Morrison told Adkins that his wife's allegations were false and that he would be contacting his attorneys to "resolve the issue." Morrison Aff. ¶ 13. Adkins gave Morrison twenty-four hours to resolve the CPO or face termination. Morrison Aff. ¶ 14.

A pre-termination meeting was held on May 28, 1998 before a neutral, Summit County Prosecutor Diana Stevenson. Morrison Aff. ¶ 20; Pltf's Exh. H. Present were Adkins (on behalf of the Sheriff), Morrison, and union representative Rick Johnston. See Pltf's Exh. H.

Morrison presented time-stamped copies of a motion to vacate the CPO and a motion to stay that had just been filed in the Domestic Relations Court. See Pltf's Exhs. E, F, H; Morrison Aff. ¶¶ 15-16. Morrison advised Adkins that a hearing on the motion(s) was set for June 3, 1998. See Pltf's Exh. H; Morrison Aff. ¶ 17. At the conclusion of the meeting, Morrison was terminated because of "the current Domestic Relations Order." Pltf's Exh. (between F and G). Diana Stevenson subsequently explained the justification for disciplinary action in more detail, in a letter to Morrison dated June 3, 1998:

On May 26, 1998, the Summit County Common Pleas Court, Domestic Relations Division, Magistrate Bernard Schwartz and Judge Carol Dezso, issued a Civil Protection Order which stated that Mr. Morrison "shall not possess, use, carry or obtain any deadly weapon." The order further provided that Mr. Morrison shall turn over all deadly weapons in [his] possession at the earliest possible opportunity to the law enforcement officer who serves Respondent with this order." The order is in effect for five years unless modified, vacated, or extended by order of the Court.

One of the requirements of Mr. Morrison's position as Deputy Sheriff is the necessity to carry his weapon. Based upon the Civil Protection Order, he is unable to fulfill this requirement, for an unspecified amount of time, up to five years.

Mr. Morrison testified that he was seeking a stay of the Civil Protection Order and that a hearing is scheduled for Wednesday, June 3, 1998. However, at the time of the hearing, the stay had not been granted and

therefore remained in effect. Mr. Morrison also testified as to circumstances regarding other deputies who have been in similar situations, and alternate methods of discipline. However, Mr. Morrison did not deny that the Civil Protection Order was in effect as of the date of the hearing and that he could not fulfill the duties of his position.

Mr. Morrison's testimony did not address whether there was just cause for discipline, but rather, what discipline should be implemented. It is not within the Hearing Officer's discretion to mete out discipline, but rather simply to determine whether just cause exists.

Based on the evidence presented, I find that there is just cause for disciplinary action. Pltf's Exh. H.

Morrison, a member of the Fraternal Order of Police, Local Lodge # 139, immediately filed a grievance challenging his termination with the union. Morrison Aff. ¶ 24. He proceeded to binding arbitration, where he was represented by his union.

Meanwhile, during the pendency of the grievance proceedings, Morrison was charged on July 2, 1998 with Domestic Violence against Jade Morrison. Defts' Exh. F (hereafter "Arbitration Decision"), at 20. On September 10, 1998, he pled "no contest" to a reduced charge of Disorderly Conduct. Id.

On March 17, 1999, the arbitration hearing commenced. See Arbitration Decision, at 1. The hearing lasted two days, during which testimony and documentary evidence in support of the parties' positions was presented. Arbitration Decision, at 2. Over the union's

objections, the Sheriff's Department was permitted to present *evidence* regarding Morrison's post-discharge arrest and conviction. Arbitration Decision, at 39-40. The arbiter framed the issue as follows:

> The question to be resolved is whether the Sheriff violated the collective bargaining agreement when it terminated [Morrison], and if so, what should the remedy be?
>
> Arbitration Decision, at 2.

On July 30, 1999, the arbiter issued a 43-page decision denying in part and sustaining in part the union's position. The arbiter found that the Sheriff failed to comply only with that part of the collective bargaining agreement ("CBA") requiring the Sheriff to provide "written specifications of the charges" against an employee prior to the pre-disciplinary hearing.2 Arbitration Decision, at 31-32. However, relying on a CBA provision requiring an investigation prior to implementing discipline and the fact that the CPO did not become a permanent order of the court until a fourteen-day appeal period ended, the arbiter decided that Morrison's May 28, 1998 discharge was premature. Arbitration Decision, at 33-37. This did not end the arbiter's analysis. He concluded that Morrison's discharge was ultimately justified based on his post-discharge conviction, which "was a direct result of continued contact with the same individual whose claims were the basis for his discharge." Arbitration Decision, at 41. Accordingly, the arbiter awarded Morrison backpay from May 28, 1998 (the date of his "premature" discharge) to July 2, 1998 (the date upon which the domestic violence charge was filed against

him). Arbitration Decision, at 42. The arbiter further decided that Morrison should be treated as if he were on leave with vacation pay from July 2, 1998 to September 10, 1998 (the date of his conviction), if so entitled. Id. Finally, the arbiter deemed Morrison justifiably discharged beginning September 10, 1998. Id.

Morrison appealed that part of the arbiter's ruling relating to post-discharge conduct to the Summit County Court of Common Pleas. Pltf's Motion, at 5. Defendants did not cross-appeal. Id. The common pleas court dismissed Morrison's appeal, holding that Morrison lacked standing to challenge an arbitration proceeding to which the union and the employer were the sole parties. Pltf's Exh. J. The Ninth District Court of Appeals affirmed the trial court's decision. Pltf's Exhs. K, L. Morrison's request that the Ninth District certify the "party-in-interest" issue to the Ohio State Supreme Court was declined. Pltf's Exhs. M-O.

In the meantime, Morrison filed the instant five-count complaint against the Sheriff in his official capacity, Yamini Adkins in her official and individual capacities and the Summit County Sheriff's Department. All parties contend that no material factual issues exist and that they are entitled to judgment as a matter of law.

II. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law." Fed. R. Civ. P. 56(c). All facts and inferences drawn therefrom must be viewed in a light most favorable to the nonmoving party. See LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993). If, after reviewing the record as a whole, a rational factfinder could not find for the nonmoving party, summary judgment is appropriate since there is no genuine issue of material fact for determination at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-8 (1986). The nonmoving party "must set forth specific facts showing that there is a genuine issue for trial" such that a jury reasonably could find for the plaintiff. Anderson, 477 U.S. at 250 (citing Fed. R. Civ. P. 56(e)). However, it is for the jury and not the judge to weigh the evidence and draw inferences from the facts. See id. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)); see also Wathen v. Gen. Elec. Co., 115 F.3d 400, 403 (6th Cir.1997) (holding that when reviewing a motion for summary judgment, the district court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party).

III. ANALYSIS

A. Counts I and IV - Federal and State Equal Protection Claims

With respect to the federal equal protection claim, Defendants contend:

In order to establish an equal protection violation against a public employer in a § 1983 action, a Plaintiff must show that the employer made an adverse employment decision "with a discriminatory intent and purpose." Charles v. Baesler, 910 F.2d 1349, 1356-57 (6th Cir. 1990). See also Gutzwiller v. Fenik 860 F.2d 1317, 1325 (6th Cir. 1988) (Plaintiff must prove by a preponderance of the evidence that he was the victim of "intentional and purposeful discrimination.") In other words, a public employee must show (1) that he was singled out and treated differently from persons similarly situated, and (2) that the Plaintiff was singled out on the basis of a prohibited characteristic, such as gender. Mercer v. City of Cedar Rapids, 104 F.Supp.2d 1130, 1140 (N.D. Iowa, 2000).

Plaintiff's Amended Complaint fails to state or even to suggest that Plaintiff is a member of any minority or class which has historically been the object of discrimination. Accordingly, Plaintiff cannot prevail on an equal protection claim, and the Defendants are entitled to summary judgment in their favor.

Defts' Motion, at 5. Citing State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd., 22 Ohio St.3d 1 (1986), Defendants note that the federal and state procedural due process

provisions "are functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law." Id., at 14-15.

The First Amended Complaint alleges only that "Defendants (sic) various acts and omissions constitute denial of equal protection of the law as provided by the 14th Amendment of the United States Constitution," Id. ¶ 61, and "Defendants (sic) various acts and omissions constitute denial of equal protection of the law as provided by Article 1, Section 2 of the Constitution of the State of Ohio." Id. ¶ 67. Plaintiff does not discuss the equal protection claims in his summary judgment motion or in his response to Defendants' Motion. Because Plaintiff has failed to set forth specific facts showing that there is a genuine issue for trial such that a jury reasonably could find for the plaintiff on these claims, they are hereby dismissed with prejudice.

B. Count V - Substantive Due Process Claim

Regarding the substantive due process claim, Defendants contend:

The violation of a fundamental right is necessary for a successful substantive due process claim. Perry v. McGinnis, 209 F.3d 597, 609 (6th Cir. 2000). Fourteenth Amendment substantive due process protects only those interests which are fundamental under the Constitution, not interests which have their source solely in state law. Bettio v. Village of Northfield, 775 F.Supp. 1545, 1558 (U.S.D.C., Ed., 1991). While state-created rights are protected by procedural due process,

they are not protected by substantive due process. Id. at 1558.

* * *

Plaintiff's complaint fails to allege the deprivation of a fundamentally protected right.

Viewing the facts most favorably to the plaintiff, even if plaintiff's complaint could be read to allege the deprivation of a property interest, this is an interest which is derived from state law and not the federal constitution. See Charles, 910 F.2d at 1355. (Court held that fundamental liberty interest in continued employment is a state-created right)

Defendants' Motion, at 11-13.

The First Amended Complaint merely alleges that "Defendants (sic) various acts and omissions constitute violations of substantive due process contrary to the provisions of the 14th Amendment to the Constitution of the United States of America." Id. ¶ 69. This pleading is insufficient to allege a substantive due process claim and Plaintiff fails to address the claim in his own motion or in response to Defendants' Motion. Because Plaintiff has failed to set forth specific facts showing that there is a genuine issue for trial such that a jury reasonably could find for the plaintiff on this claim, it is hereby dismissed with prejudice.

C. Counts II and III - Federal and State Procedural Due Process Claims

The only claims that the Plaintiff addresses on the merits are the procedural due process claims. The Court concludes that Morrison is precluded from claiming procedural due process violations under 42 U.S.C. § 1983 for the following reasons.

Under 42 U.S.C. §1983, a civil action may be brought against state officials who deprive citizens of their constitutional rights. fn3 The doctrine of qualified immunity, however, protects those officials performing discretionary functions from §1983 actions insofar as their conduct does not violate clearly-established constitutional rights of which a reasonable person would have known. Jackson v. Leighton, 168 F.3d 903, 909 (6th Cir. 1999) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). In determining whether a constitutional right is clearly established, the Court must look first to decisions of the Supreme Court, then to decisions of the Sixth Circuit and its district courts, and finally, if necessary, to decisions of other circuits. Daugherty v. Campbell, 935 F.2d 780, 784 (6th Cir. 1991), cert. denied, 502 U.S. 1060 (1992). Before determining whether the right violated was clearly established or examining the reasonableness of a defendant's conduct in relation thereto, the Court should decide as a preliminary matter whether a violation of a constitutional right occurred at all. Jackson, 168 F.3d at 909 (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991); County of Sacramento v. Lewis , 523 U.S. 833, 842 n.5 (1998); Gratsch v. Hamilton County, No. 00-3398, 2001 WL 406440 **12 (6th Cir.

Apr. 3, 2001) (citing Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir.1998)).

The Fourteenth Amendment prohibits state actors from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Collyer v. Darling, 98 F.3d 211 (6th Cir. 1996), cert. denied, 520 U.S. 1267 (1997). In Parrat v. Taylor, 451 U.S. 527, 543-44 (1981), the Supreme Court held that when an individual is deprived of a property interest by the state due to the failure of state agents to follow state procedure, due process is satisfied if the employee had access to meaningful postdeprivation process. Collyer, 98 F.3d at 223. This holding has been extended to the state employment context. Id. (citing Hudson v. Palmer, 468 U.S. 517, 532-33 (1984)). To determine whether a due process violation has occurred, the Court must consider "the entire spectrum of predeprivation and postdeprivation process provided by the state." Collyer, 98 F.3d at 223 (citing Zinermon v. Burch, 494 U.S. 113 (1990)). The focus must be on adequacy of the procedures. Collyer, 98 F.3d at 223 (citing Parratt, 451 U.S. at 543; Sutton v. Cleveland Bd. Of Educ., 958 F.2d 1339, 1349 (6th Cir. 1992)). To state a procedural due process claim in the employment context, a plaintiff must show that he had a property interest in continued employment, and that he was not provided the constitutional minimum of due process. Gratsch, 2001 WL 406440 **12 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-42 (1985)). It is undisputed that Morrison had a property interest in his continued employment as a deputy sheriff. When a plaintiff has a protected property interest in his job, a predeprivation hearing of some sort is generally required to satisfy due process. Leary v. Daeschner,

228 F.3d 729 (6th Cir. 2000) (citing Loudermill, 470 U.S. at 542). Predeprivation process need not be elaborate. Id. The employer must generally provide oral or written notice to the employee of the charges against him, an explanation of the employer's evidence, and an opportunity for the employee to present his side of the story. Collyer, 98 F.3d at 224 (citing Loudermill, 470 U.S. at 546); McGowan v. Cuyahoga Metro. Hous. Auth., No. 99-3921, 2000 WL 1140758 **1 (6th Cir. Aug. 8, 2000). "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Loudermill, 470 U.S. at 546. The sufficiency of predeprivation procedures must be considered in conjunction with the options for postdeprivation review. Collyer (citing Sutton, 958 F.2d at 1349). If elaborate procedures for postdeprivation review are in place, less elaborate predeprivation process may be required. Id.

Morrison's procedural due process claims are predicated upon three distinct grounds:

(1) lack of adequate notice for the pre-termination hearing of May 28, 1998;

(2) lack of any notice or hearing relating to the subsequent misdemeanor conviction; and

(3) lack of review of the arbitrator's decision relating to the subsequent misdemeanor conviction. Pltf's Motion, at 9. As to the first element of his claim, Morrison contends that the notice provided to him prior to the pre-termination hearing "was clearly inadequate" because he was not given written specification of the

charges as required by the CBA. Further, he was deprived of the opportunity to confront and cross-examine witnesses, as provided by the CBA, or to adequately prepare for the May 28, 1998 hearing. Id.

While the CBA may have required that the Sheriff give Morrison a written specification of the charge against him, the Fourteenth Amendment does not. Oral notice is sufficient, Loudermill, 470 U.S. at 546; Collyer, 98 F.3d at 224, and there is no question that Morrison was verbally apprised of the pre-termination hearing, and the reason for it. Based on Morrison's own affidavit, Adkins presented him with a copy of the CPO and instructed him to be present at a termination conference on May 28, 1998. When Morrison told Adkins that his wife's allegations were false and that he would be contacting his attorneys to "resolve the issue," Adkins gave him twenty-four hours to resolve the CPO or face termination. The hearing was held before a neutral hearing administrator, Diana Stevenson; Morrison was permitted to present evidence of his motion to vacate the CPO and the date of the motion hearing; a union representative accompanied Morrison to the meeting; and the neutral prepared a written report setting forth the reasons justifying disciplinary action. Supra, at 3-4. The arbiter himself noted that the only issue in contention at the pre-termination hearing was the existence of the CPO, not the factual allegations contained therein, and he concluded that the only CBA procedural requirement with which the Sheriff did not strictly comply was the one calling for "written specification of the charges." Due process, however, requires only oral notice, presentation of the evidence against the employee, and an opportunity to respond. Loudermill, 470 U.S. at 546.

Since Morrison received all of these, the Court finds that he received constitutionally adequate predeprivation process.

Even if Morrison hadn't been given adequate predeprivation process, the CBA's postdeprivation procedures provided Morrison with the opportunity to challenge his discharge in a far more detailed manner (four-step review plus arbitration). Buckner v. City of Highland Park, 901 F.2d 491, 497 (6th Cir.), cert. denied, 498 U.S. 848 (1990). Morrison does not complain that the postdeprivation procedures were inadequate with respect to his May 28, 1998 discharge, presumably because the arbiter found that the May 28th discharge was premature. Rather, he complains that he was never provided advance notice that the Sheriff's Department intended to introduce evidence relating to his post-termination conviction at the arbitration, or a pre-termination hearing with respect to the new criminal act.

The CBA's grievance procedures culminate in binding arbitration. In Ohio, when a collective bargaining agreement provides for final, binding arbitration of all grievances, the parties are generally restricted to that procedure. O.R.C. 4117.10, Ste. Marie v. City of Dayton, 109 F.Supp.2d 846, 852 (S.D. Ohio 2000) (citing Cook v. Maxwell, 57 Ohio App.3d 131, 134 (1989)). Parties to the arbitration may appeal the arbiter's decision to the appropriate state court under O.R.C. 2711.10. See, e.g., City of Portsmouth v. International Ass'n of Fire Fighters, Local 512, 139 Ohio App.3d 621 (2000); Wilson v. Toledo Bd. of Educ., No.-L-85-425, 1986 WL 11389 (Ohio App. Dist. 6, Oct. 17, 1986). Where a collective bargaining agreement does not give a state employee

the right to proceed to final and binding arbitration, the employee may avail himself of state civil service remedies and judicial review in state court. O.R.C. 4117.10; Sutton, 958 F.2d at 1345-46; Ste. Marie, 109 F.Supp.2d at 852-53. Morrison does not explain how the postdeprivation procedures set forth in the CBA are inadequate, and the Sixth Circuit has ruled that the state-mandated postdeprivation procedures are sufficiently meaningful to pass constitutional muster. Collyer, 98 F.3d at 227-28.

Although the Court declines to engage in a substantive review of the arbitration decision, suffice it to say that the arbiter carefully considered whether Morrison's post-termination conduct was properly before him in determining the propriety of Morrison's discharge, and set forth numerous reasons for its inclusion. See Arbitration Decision, at 39-41. Whether that decision was correct or incorrect is not for this Court to decide, and does not render the process inadequate. Conversely, adequacy of process does not guarantee a favorable decision on the merits. If Morrison felt that the Sheriff's Department violated the CBA by failing to give him advance notice, prior to the arbitration hearing, that it would rely upon the September 10, 1998 conviction as a basis for termination, Morrison could have filed a new grievance under the CBA.

Morrison also contends that the procedures are inadequate because there was no judicial review of the arbiter's decision that his discharge was justified based on his post-termination conviction. It is undisputed that his union could have appealed that part of the arbiter's decision to the common pleas court, but chose not to. While Morrison might have a claim against the union

for failure to adequately represent him, such does not translate into a violation of constitutional due process.

Finally, during pretrial conferences, much discussion was had on the issue of whether the Brady Bill prevented Morrison from fulfilling his duties as deputy sheriff (based on his post-termination conviction) -- an issue the Defendants now contend is irrelevant to the resolution of this case. Morrison asserts that the pre-purchase background check required under the Brady Bill does not prohibit him from carrying a firearm, and provides evidence that he has actually purchased a handgun. Thus, no statutory disability justified his discharge and the Court should grant summary judgment in his favor on that basis alone. However, Defendants never waived their right to argue that Morrison received adequate due process regardless of the Brady Bill and, the undisputed fact is, Morrison was prohibited by court order from carrying or using a deadly weapon from May 14, 1998 (the date the TPO was issued) until June 8, 1998 (the date the CPO was vacated).

The issues of whether the Sheriff should have waited to see if Morrison would be successful in his efforts to vacate the CPO before terminating him (something neither the CBA nor the U.S. Constitution requires) and whether the arbiter exceeded his power by considering Morrison's post-termination conviction in his review of Morrison's discharge, do not implicate due process and are not for this Court to decide.

In short, because Morrison cannot show that Defendants violated his procedural due process rights,

his state and federal claims fail. His remedies, if any, lie elsewhere.

IV. CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment filed by Defendants (ECF No. 21) is GRANTED and Plaintiff's Motion for Summary Judgment (ECF No. 25) is DENIED.

IT IS SO ORDERED.

S/Dan Aaron Polster 4/24/02
Dan Aaron Polster
United States District Judge

Footnotes

fn1 Timothy first met Jade, a nurse, after she began working at the jail in December 1996. Evidentiary Appendix to Defentants' Motion for Summary Judgment, ECF No. 24 (hereafter "Defts' Exh."),F, at 7. Jade was not an employee of the Sheriff but of Correctional Medical Systems, which had a contract with Summit County to provide nursing services to the jail. Id. She worked at the jail from December 1996 through at least July 30, 1999, the date that the arbitration decision was issued in this case. Id.

fn2 The Union also claimed that the Sheriff violated that part of the CBA requiring that the employee subject to discipline be given "an opportunity to offer an explanation of the alleged misconduct." Arbitration Decision, at 32. Quoting the CBA, the arbiter determined that the specific power given to an

employee is to "appear at the hearing and have one chosen representative present oral or written statements in defense of the employee," and "to confront and cross examine witnesses." Id. Since the Sheriff only relied on the existence of the CPO as a basis for Morrison's discharge (rather than the factual allegations contained in the CPO), the need to allow Morrison to present a defense and confront witnesses was severely diminished. Arbitration Decision, at 33

[Morrison] provided the best defense he had, namely that his attorney was attempting to have the order modified. Based on the mandates of the Agreement, he was given an opportunity to defend himself. Since there were no witnesses to confront as it pertained to the legitimacy of the CPO as it stood on the day of the pre-disciplinary hearing, then that procedural requirement was not violated.

Id.

fn3 Defendants contend that the Summit County Sheriff's Department should be dismissed outright because it is not a "person" subject to liability under 42 U.S.C. § 1983. Morrison does not address this issue. The Summit County Sheriff's Department is not an independent entity, but a governmental unit of Summit Couny. See Papp v. Snyder, 81 F.Supp.2d 852, 857 n.4 (N.D. Ohio 2000) (citing Williams v. Dayton Police Dept., 680 F.Supp. 1075, 1080 (S.D. Ohio 1987)). Further, claims against the Sheriff and the Personnel Director in their official capacities is tantamount to a claim directly against Summit County. Papp, 81 F.Supp.2d at 857 n.4 (citing Brandon v. Holt, 469 U.S. 464, 471-72 (1985)).

C.A. NO. 20313

IN THE COURT OF APPEAL
NINTH JUDICIAL DISTRICT

TIMOTHY MORRISON,
Appellant,

v.

SUMMIT COUNTY SHERIFF'S DEPARMENT
C/O RICHARD L. WARREN
Appellee.

STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE NO. CV 99 10 4229

DECISION AND JOURNAL ENTRY

Dated: June 20, 2001

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge,

Appellant Timothy Morrison has appealed the judgment of the Summit County Court of Common Pleas dismissing his motion to vacate the arbitrator's

decision, which affirmed the termination of his employment from the Summit County Sheriff's Office. This Court affirms.

I.

Morrison was employed by the Summit County Sheriff's Office ("SCSO") as a deputy sheriff assigned to the patrol division. In March of 1998, Morrison struck his wife Jade Morrison, and injured her under her right eye. On May 13, 1998, Morrison grabbed his wife and threw her to the ground.

On May 1 4, 1998, magistrate of the Summit County Court of Common Pleas, Domestic ,Relations Division, issued an ex parte temporary protection order ("TPO"). Among the terms of the TPO was: "[Morrison] SHALL NOT POSSESS, USE, CARRY, OR OBTAIN ANY "DEADLY WEAPON. [Morrison] shall turn over all deadly weapons in [Morrison's] possesion at the earliest possible opportunity to the law enforcement officer who serves [Morrison] with this Order." Pursuant to the service o the TPO, a captain a and two deputies seized three handguns from Morrison on on May 14, 1998.

On May 20, 1998, the magistrate-convened a hearing on the TPO. On May 26, 1998 the magistragte found that Morrison engaged in domestic violence against his wife and issued a civil, protection order ("CPO"). The CPO continued the prohibition against Morrison possessing any deadly weapon Attached to the CPO was the following warning: "You may also be subject to federal penalty for possessing, transporting, or accepting a

firearm under the Gun Control Act, 18 U.S.C. Section 922(g)(8),"

On May 26, 1998, the SCSO received notice of the CPO against Morrison. On May 27, 1998, the SCSO summoned Morrison to a meeting at which he was given notice of administrative charges being brought in order to terminate his. employ with the SCSO. The SCSO sought to terminate Morrison because of his inability to possess a handgun or any weapon rendered him unable to perform the duties of a deputy sheriff, and because Morrison's conduct offended the policy of zero tolerance for employees engaged in domestic violence.

On May 28, 1998, a pre-disciplinary hearing was held before a neutral administrator. At the close of the hearing, the administrator made a finding of probable cause to discharge Morrison. Morrison was tendered a letter of discharge.

Pursuant to the collective bargaining agreement (-"the Agreement") between the Summit County Sheriff and the Fraternal Order of Police Local Lodge #139 ("'FOP"'), Morrison filed a grievance, to be heard and resolved by an arbitrator. On July 30, 1999, the arbitrator affirmed the termination of Morrison.

Morrison filed a motion to vacate the ruling of the arbitrator in the Summit County Court of Common Pleas The SCSO responded in opposition The trial court granted SCSO's motion to dismiss.

Morrison has appealed, asserting two assignments, of error.

II.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS

In his first assignment of error, Morrison claims that the trial court improperly granted the SCSO's motion to dismiss. This Court disagrees.

Under certain circumstances, a "court of common pleas shall make an order vacating [an arbitration] award upon the application of any party to the arbitration[.]" (Emphasis added.) R.C. 2711. 10. The issue before this Court then is whether Morrison is a "party to the arbitration."

Our analysis is persuasively informed by the Sixth District Court of Appeals in Wilson v. Toledo Bd. of Edn. (Oct. 17, 1986), Lucas App. No. L-85425, unreported:

We have found no Ohio case or statute defining who is a "party" within the meaning of R.C. 2711.10. Nonetheless, we are guided by several federal decisions which describe who has standing to vacate various arbitration awards in federal court. The general rule is that individual employees have no standing to challenge an arbitration proceeding to which the union and the employer were the sole parties. Anderson v. Norfolk & Western Ry. Co. (C.A.7,1985), 773 F.2d 880, 882. See, e.g., Vosch v. Werner Continental, Inc. (C.A.3, 1984), 734 F.2d 149, 154, certiorari denied, __U.S. __,105 S.Ct. 784 (1985). An exception to this general rule occurs

where the union has breached its duty of fair representation or on grounds of fraud and deceit. See, Vosch, supra, at 154; Andras v. Convoy Co. (C.A.9, 1973), 480 F.2d 604, 606, certiorari denied, 414 U.S. 989 (1973); Harris v. Chemical Leaman Tank Lines, Inc. (C.A.5, 1971), 437 F.2d 167, 171; Acuff v. Papermakers and Paperworkers, AFL-CIO (C.A.5, 1968), 404 F.2d 169, 171 n.2, certiorari denied, 394 U. S. 987 (1969); Lofton v. U.S. Postal Service (S.D.N.Y. 1983), 592 F. Supp, 36; United States Postal Service v. American Postal Workers Union (S.D.N.Y.1984), 564 F. Supp. 545, 547-51. Cf. Braswell v. Lucas Metropolitan Housing Auth. (June 14, 1985), Lucas App. No. L-84-393, unreported (this court observed that "federal courts have recognized the right of an employee to pursue remedies against an employer when the union has blocked contractual grievance arbitration by alleged breach of its duty of fair representation * * * This exception to the he general rule preventing direct actions by an employee against an employer has also been followed in state courts.")

Based on the foregoing case law, we c conclude that an employee such as Wilson doe not have standing to challenge an arbitration award, pursuant to R.C. 2711.10, and is not a "party" within the meaning of that statute where the union (TFT) and the employer (Board) were the sole parties to the arbitration proceeding.

Careful review of the Agreement reveals that in Article 1 the parties are set forth as the Summit County Sheriff and the FOP. Further, in Article 5, the FOP is recognized as the "sole and exclusive representative." Lastly, in Article 9, the Agreement states; "The FOP,

based upon the facts presented, has the right to decide whether to arbitrate a grievance."

Based on the express terms of the Agreement, and based on the persuasive authority of Wilson, this Court concludes that the proper parties to the arbitration were the FOP and the SCSO. Since Morrison was not a party to the arbitration, Morrison had no standing to invoke the jurisdiction of the court of common pleas under R.C. 2711.10. Accordingly, the trial court properly dismissed Morrison's motion to vacate the arbitrator's decision.

Morrison's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DENYING APPELLANT'S PETITION FOR A DECLARATORY JUDGMENT.

In his second assignment, of error, Morrison claims that the court of common pleas erred when it denied his claim for declaratory relief against the arbitrator's decision. This claim is wholly without merit.

The Ohio Supreme Court has dispositively rejected Morrison's argument; R.C. Chapter 2711 provides the exclusive statutory cry remedy which parties must use in appealing arbitration awards to the court of common pleas. An action in declaratory judgment cannot be maintained to circumvent the clear legislative intent of R.C. Chapter 2711.

Galion v. AFSCME (1995), 71 Ohio St. 3d 620, paragraph two of the syllabus. Accordingly, Morrison's second assignment of error is overruled.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the County of Summit, Court of Common Fleas, to carry this judgment meet into execution, A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run App.R. 22(E).

Costs taxed to appellant.

Exceptions.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BAIRD, J.
CONCURRS IN PART AND DISSENTS IN PART, SAYING:

It seems to me that the ability or inability of an individual to file and prosecute a grievance is a matter which is decided by the employer and the union when the labor-management agreement is negotiated. I know of no law which mandates how that issue must be treated in such an agreement. Here it is clear that the agreement provides that a grievant may proceed with his grievance without the intervention of the union, and that such right exists notwithstanding any other provision of the labor-management agreement. Moreover, the grievance at issue in this case as, in fact, filed by the employee.

While the union does have the sole right to decide whether to arbitrate a grievance filed by the union, this grievance was filed by the employee, and his right to pursue it prevails, by reason of the contractual anguage, over the union's right to decide not to proceed.

For these reasons, I would sustain the first assignment of error. I concur in the balance of the majority opinion.

APPEARANCES:

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YAMINI ADKIN , Director of Administration,Summit County Sheriff's Office, 53 University Avenue, Akron, Ohio 44308, for appellee

CASE NO. CV 99-10 4229
JUDGE BOND

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

TIMOTHY MORRISON
Plaintiff,

vs.

SUMMIT COUNTY SHERIFF'S DEPARTMENT
C/O RICHARD L. WARREN
Defendant.

ORDER

FILED September 22, 2000

This cause came before the Court on Defendant's Motion to Dismiss. In consideration thereof, the Court hereby makes the following findings of fact and conclusions of law.

Petitioner filed this action to Vacate an Arbitrator's Award and for Declaratory relief. R.C. 2711. 10 provides, in pertinent part:

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

(A) The award was procured by corruption, fraud, or undue means.

(B) There was evident partiality or corruption on the part of the arbitrators, or any of them.

(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. (emphasis added)

The Court finds persuasive Wilson v. Toledo Bd. of Education (1986), Ohio App. Dist. 6, which held that individual employees have no standing to challenge an arbitration proceeding to which the union and the employer were the sole parties. Wilson held that an individual employee is not "party to the arbitration" within the he language of R.C. 2711.10.

The Court concludes, therefore, that Summit County and the Fraternal Order of Police, Local #139, were the only "parties" to the arbitration, within the meaning of R. C. 2711.10, why have standing to challenge the arbitrator's decision ion in this case. Thus, the Court finds Respondent's motion is well-taken. Accordingly, Respondent's Motion to Dismiss Petitioner's action to Vacate Arbitrator's Award is hereby granted.

Petitioner also asserts a claim far declaratory relief. Where a special statutory procedure exists far relief, an action for declaratory judgment is inappropriate. Galion v. AFSCME (1995), 71 Ohio St.3d 620; State ex ref.

Albright v Delaware Cty. Court of Common Pleas (1991), 60 Ohio St.3d 40. The Court finds that because R.C. 2711.10 authorizes a limited and narrow judicial review of an arbitration award, it is the exclusive remedy which parties must use in appealing arbitration awards to the courts of common pleas. Accordingly, Respondent's Motion to Dismiss Petitioner's claim for Declaratory Judgment is well-taken and is hereby granted.

So ordered.
JUDGE JANE BOND

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dle 99-4229

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No. 02-3672

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY MORRISON,
Plaintiff-Appellant,

v.

SUMMIT COUNTY SHERIFF'S DEPARTMENT, ET AL.,
Defendants-Appellees.

October 18, 2004, Filed

JUDGES: BEFORE: MARTIN, RYAN, and MOORE, Circuit Judges.

OPINION: ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

IN THE MATTER
OF
ARBITRATION
BETWEEN

SUMMIT COUNTY SHERRIF'S DEPARTMENT

AND

FRATERNAL ORDER OF POLICE
LOCAL LODGE #139

Grievance: Discharge; Deputy Timothy Morrison
Dates of Hearing: March 17, and 18, 1999
Location: Summit County Jail
Case No. 981015-14800-6
Date of Award: July 30, 1999

Union Representative:

Gwen Callender
General Counsel
Fraternal Order of Police,
Ohio Labor Council, Inc.
222 East Town Street
Columbus, Ohio 43215

Employer Representative:

Eugene P. Nevada
Senior Consultant
Clemans, Nelson & Associates, Inc.
355 E. Campus View Blvd., Suite 125
Columbus, Ohio 43235

because the Sheriff had confiscated all his guns;

she claimed that the Grievant continually left work early so that he could cone home and force her to have sex which was impossible since the Grievant was the sole deputy in an area forty to forty five (45) minutes away during the period alleged; and,

she claimed that the Grievant broke his right-hand little finger and caused her to receive a black eye with her skin hanging "off her face" even though the accident the Grievant was involved in was well documented, no one testified to having seen her black eye, and she never filed a report.

It contends that if Jade Morrison had really been physically abused, then other deputies who are trained and duty-bound to report such incidents, and who worked with Jade Morrison on a regular basis, would have reported the incidents. Since no such witnesses were forthcoming, then it contends that Jade Morrison should be found to be a liar and should not be believed.

For all these reasons, it asks that the Grievance be sustained and the Grievant be placed back to work without loss of seniority or benefits.

Discussion and Findings

A review of the record reveals that the Grievance must be sustained in part and denied in part. The basis for this finding lies in the fact that the Sheriff made some procedural errors in the administration of the discharge but that all the facts being given fair consideration, the Sheriff is justified in not returning the Grievant to its employ.

In order to logically attack this case, it is necessary to start with the issues that could potentially resolve the entire matter at the earliest point possible. In this case, the Union's claim that the procedural errors were sufficient to justify a reversal of the termination make that issue the most logical to address first. In determining whether the alleged procedural errors were sufficient to justify a reversal of the termination, it is necessary to first determine what errors, if any, were committed.

The Agreement requires the following:

1. A Disciplinary Hearing must be scheduled in order "to give the employee an opportunity to offer an explanation of the alleged misconduct."

2. Prior to a Disciplinary Hearing, "the employee shall be given written specifications of the charges."

3. The employee may choose to: "(1) appear t the hearing to present oral or written statements in his defense; or, (2) appear at the hearing and have one (1) chosen representative present oral or written statements in defense of the employee; or, (3) elect in

writing to waive the opportunity to have a disciplinary hearing."

4. At the Disciplinary Hearing, the neutral hearing administrator will ask the employee or his representative to respond to the allegations of misconduct which were outlined to the employee.

5. At the Disciplinary Hearing, "the employee may present any testimony, witnesses, or documents which explain whether or not the alleged misconduct occurred ... The employee shall provide a list of witnesses and the name and occupation of his representative, if any, to the Employer as far in advance as possible, but no later than eight (8) hours prior to the disciplinary hearing."

6. "The employee will be permitted to confront and cross examine witnesses.

A comparative analysis of these mandates with the facts of the case show that the Sheriff failed to strictly follow these rules. Most glaring is the fact that the Grievant did not receive a written copy of the charges against him prior to the pre-disciplinary hearing. The language says that "the employee shall be given written specifications of the charges." It is strong mandatory language and, since Adkins admitted that such was not done, then it must be found that the Agreement was violated in this respect.

Instead of determining the appropriate remedy for the failure to give a written specification of the charges, it is best to reserve the decision until the remainder of the matter is decided. Notwithstanding the reservation of that decision, it is appropriate to address the Sheriff's

claim that the CPO was a sufficient written specification of the charges. That claim must be rejected. The mandate to provide employee's with a written specification is based on strong language, is an easy burden to comply with, and is a mandate on the Sheriff -- not the courts. Since the CPO is from the courts, and since the Sheriff, and not the Court, is a party to the Agreement, then the Sheriff must comply with the mandates of the Agreement and cannot rely on Court Orders to relieve it of its contractual obligation.

Before proceeding to the merits of the dispute, it must be determined whether any other procedural errors were made by the Sheriff. The Union claimed that the Sheriff violated the Agreement by failing to meet its requirement that the employee subject to discipline be given "an opportunity to offer an explanation of the alleged misconduct." A review of the pre-disciplinary provision shows that it provides both this general description of its purpose as well as a more specific enumeration of the explicit powers that the employee has to o accomplish that general purpose. The specific power given to an employee is to "appear at the hearing and have one (1) chosen representative present oral or written statements in defense of the employee," and "to confront and cross examine witnesses." Applying this language, it must be found that the Sheriff did not violate any other of the procedural mandates.

This finding would vary if the Sheriff had relied in any way on the factual allegations contained in the TPO or CPO. However, since the Sheriff only relied on the existence of the CPO, then that is the only fact that it needed to allow the Grievant to address. If it had relied on the facts contained therein, then it would have

plainly violated the Agreement since the witnesses making the allegations were not present at the pre-disciplinary hearing. Since, instead, the Sheriff relied solely on the CPO, then the need to allow the Grievant to present a defense and to confront witnesses is severely diminished. Indeed, in this case, he was asked to defend himself regarding the mandates of the CPO only - none of the factual allegations were deemed relevant. He provided the best defense he had, namely that his attorney was attempting to have the order modified. Based on the mandates of the Agreement, he was given an opportunity to defend himself. Since there were no witnesses to confront as it pertained to the legitimacy of the CPO as it stood on the day of the pre-disciplinary hearing, then that procedural requirement was not violated. Thus, other than the written specification requirement, the Sheriff did not violate the remaining procedural provisions of the Agreement.

Other than these procedural problems, a unique question must be answered with regard to the effect of the Magistrate vacating her CPO. A review of the facts show that the Sheriff acted prematurely in discharging the Grievant based purely on the existence of the CPO. While the Sheriff attempted to classify the modification as "after-acquired" evidence, the Union argued that it was a change of a Court Order that could not be so classified. It is necessary to discuss the importance of the CPO to the Sheriff's case.

As it regards the CPO, the strength of the Sheriff's case is also its weakness. The Sheriff claimed that the formality of the pre-disciplinary hearing was not necessary since its decision was based on the CPO. It claimed that since the CPO forbade the Grievant from

carrying a gun, and since the CPC provided notice of the charges against him, then the internal procedure was not as important as it might otherwise have been. This argument is persuasive. The Sh ff's office is required to obey the laws of the State of hio; the laws of the State of Ohio are enforced by the Court; if the Court makes an Order the Sheriff must obey it without question. If this breakdown of authority is not followed our system of government is in jeopardy, The Sheriff thus properly used its initial decision on a CPO of the court system where its jurisdiction lies.

That however does not address the requirements of the Agreement. The Agreement requires investigation. The amount of investigation that must be conducted prior to implementing discipline is directly related to the complexity of the allegations. The CPO, by itself, is a very simple allegation - either it is a valid prohibition against the carrying of a firearm or it is not. The factual allegations supporting the CPO are much more complicated. If the Sheriff relies only on the CPO, its investigation will necessarily be very simple. If it relies in any way on the remainder of the factual allegations, then the necessary investigation will be much more complicated. In this case, it only relied on the CPO and thus its limited investigation was reasonable and complied with the terms of the Agreement.

This powerful position of the Sheriff would have been difficult for the Union to overcome if only the CPO had remained in effect. The Sheriff benefited from the CPO in that it had little to investigate. The benefit had a risk in that if the CPO were overturned, the Sheriff would have no Court Order to support its decision. It would then be obligated to conduct a fair and reasonable

investigation into the facts alleged if it determined that the discipline it imposed were to remain. It must be determined whether the vacation of the CPO should have thus modified the Grievant's discharge. A review of the facts shows that three (3) overlapping reasons exist for finding that acting on the CPO when the Sheriff did was premature.

The most powerful factor affecting the finding that the discharge was premature was the Agreement. The pertinent portions of Section 10.4 of the Agreement state that:

Any employee under indictment or arrested for a felony or a crime of moral turpitude, who is not disciplined or discharged by the Employer, shall be placed on a leave of absence without pay until resolution of the court proceedings. An employee may use accrued vacation or holiday time during the leave. An employee found guilty by the trial court shall be summarily discharged. An employee found innocent of the charges shall be paid for all last straight time hours and shall have any vacation or holiday time used restored to his credit. The Employer shall continue to pay the employee's insurance premiums during the leave of absence.

While the cited language is not mandatory, in that it only applies if an employee is not "disciplined or discharged," it provides a backdrop against which the Sheriff's action can be measured. The language provides for a specific method in which the Sheriff can protect its public image, allow for the Court system to independently rule on the guilt or innocence of an employee, and not act hastily in a decision to discharge an employee. Because of its non-mandatory language,

the provision is not, alone, a valid basis upon which to find that the Sheriff violated procedural rules. It does however support a finding that the Sheriff could have acted differently. This factor along with the two (2) remaining elements justify a finding that the decision to discharge the Grievant based solely on the CPO was premature.

The second element that justifies this finding is that the Grievant gave notice to the Sheriff that the order could potentially be vacated. Prior to taking action, the Sheriff was given a copy of the Motion that had been filed. The safe thing to do would have been to continue the matter for a short period to make inquiries as to the basis of the Motion. Indeed, the Sheriff had nothing to gain by discharging the Grievant instead of placing hire on a suspension pending outcome of the Motion. Lead of continuing the matter for even one (1) day, the Sheriff elected to continue with the pre-disciplinary hearing based solely on the CPO. These two (2) important factors are intermingled together and joined by a third significant fact.

The rule of civil procedure giving the Magistrate's order its vii validity did not make the Order permanent until fourteen (14) days after its issuance. This is based on the fact that a Magistrate's Order does not become a Permanent Order of the court until the fourteen (14) day appeal period ends. A review of the pertinent law is necessary to fully explain.

O.R.C.P. 53(E)

* * *

(3) Objections.

(a) Time for filing. Within fourteen days of the filing of a magistrate's decision, party may file written objections to the magistrate's decision. If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a request for findings of fact and conclusions of law under Civ. R. 52, the time for filing objections begins to run when the magistrate files a decision including findings of fact and conclusions of law.

(b) Form of objections. Objections shall be specific and state with particularity the grounds of objection. If the parties stipulate in writing that the magistrate's findings of fact shall be final they may object only to errors of law in the magistrate's decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule.

(4) Court's action on magistrate's decision.

(a) When effective. The magistrate's decision shall be effective when adapted by the court. The court may adapt the magistrate's decision if no written objections are filed unless it determines that there is an error of law or other defect on the face of the magistrate's decision.

* * *

(c) Permanent and interim orders. The court may adopt a magistrate's decision and enter judgment without waiting for timely objections by the parties, but the filing of timely written objections shall operate as an automatic stay of execution of that judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered. The court may make an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. An interim order shall not be subject to the automatic stay caused by the filing of timely objections. An interim order shall not extend more than twenty-eight days from the date of its entry unless, within that time and for good cause shown, the court extends the interim order for additional twenty-eight days.

(Emphasis added)

It appears from the submissions made to the undersigned that the Magistrate made a decision on May 26, 1998, that was approved by the Court as Permanent Order. Paragraph (c) above shows that the Court had a choice - either a Permanent Order or an Interim one. With a Permanent Order the Grievant had the option of objecting to the Magistrate's findings and automatically staying the execution of the Order. If the Court had wanted to prevent the automatic stay provision, it could have issued an Interim Order. Since it chose not to, it must be found that the CPO could have been automatically stayed by the Grievant filing objections to the Magistrate's order.

Since the Grievant had this ability, and since the Sheriff relied solely on the CPO in making its decision, then it should have waited until the fourteen (14) day time period had elapsed. As a law enforcement agency, it is responsible for knowing and understanding the laws under which it operates. Along with this responsibility is the duty to act appropriately to Court Orders based on the law which the court orders fall under. In this case, the Court order could have been stayed automatically and its decision to terminate the Grievant would have been made prematurely.

These three factors together require a finding that the Sheriff acted prematurely in discharging the Grievant. The Sheriff was notified that the Grievant was filing a Motion; the Agreement provides a method where the Sheriff can wait until the Court makes a final determination; and the Permanent Order could have been automatically appealed. Instead of waiting to see if the motion were modified by giving the Grievant the ability to use vacation time, the Sheriff chose to ignore this warning as was its right. However, along with the benefit of discharging the Grievant as soon as possible is the risk that the CPO upon which his discharge was based could be reversed. Since the CPO was ultimately vacated, and since the Sheriff should know that such was a possibility when it made its decision to discharge, then the CPO fails as a valid basis upon which to discharge the Grievant. However, the question of the appropriate remedy for acting premature, as before, must be reserved until all the remaining issues are decided.

This finding stands even though the Sheriff claimed that the Magistrate, in the transcript to the hearing on

June 3, 1998, makes it clear that she does not consider the remainder of her findings to be vacated. Even if that were the Magistrate's opinion, the Court speaks through its orders. The Order presented to the undersigned states that the CPO is vacated full. No qualification is given and none can be inferred. Specifically, the Order states that "it is the decision of this Magistrate that the Civil Protection Order issued May 26, 1998 be vacated and held for naught." The Order being thus vacated, it is too difficult to parse those portions that support either side. It is logical to apply the Order vacating the original CPO as the plain language contained therein states. As a result, the original CPO must be held for naught.

This finding must also stand even though the Sheriff made a persuasive argument that it should not be burdened with waiting until all appeals have run before taking action. While this argument has same legitimacy, the facts show that the Sheriff would only have had to wait fourteen (14) days, This is a short period and, together with the ability to place the Grievant on a leave pending the outcome, overrules the Sheriff's argument that it should not have to wait until all appeals are exhausted.

What remains is determining whether the Grievant's discharge, notwithstanding these procedural problems, should be upheld. The principal that both Parties argued for and against is the "after-acquired" evidence theory. Indeed, many difficult issues were presented in this case and none was so jumbled s the concept of "after acquired" evidence. A brief review of the standard in applying this concept is appropriate.

In labor arbitration, the general rule is that Employers are rarely allowed to introduce reasons for discipline that are not contained the notice of discipline. Often, evidence discovered after the discharge has been made is not permissible, nor properly considered, in determining whether just cause exists. Employers are required to prove that their decision was based on just cause as it existed when the decision to terminate was made. New evidence about other misconduct is typically not allowed. This holds especially true if the new evidence involves post discharge conduct. In this case, since the existence of the CPO alone was the basis for the discharge, then the evidence introduced at the hearing must be given its proper classification -- either new evidence of the same misconduct, or as evidence of post-discharge conduct.

All the evidence that was introduced that tended to either support or undermine the CPO is properly categorized as evidence acquired after the discharge but relating to misconduct that is alleged in the CPO. The general rule is that an Employer cannot enlarge the reasons for the disciplinary action provided at the time of its determination, but may continue its investigation of the case after discharge to buttress its allegations. New York Telephone Company, 66 LA 1037 (Markowitz 1976) Indeed, any evidence that tends to exculpate an employee is properly considered even if it is acquired after the fact. 21 LA 59 (Thompson 1953) and Amoco Oil Co., 61 LA 10 (Cushman 1973). (The exculpatory rule thus negates the Sheriff's claim that consideration of the Magistrate vacating the original CPO somehow "opened the door" and allowed further "after acquired" evidence to be considered. It is simply inaccurate to say that

"after-acquired" evidence tending to show that an employee was improperly discharged is inadmissible.)

Due to the reliance on the CPO by the Sheriff, it has previously been held that the Sheriff acted prematurely. However, conduct by an employer that is premature does not necessarily result in overturning the discipline. The amount of prejudice resulting from the premature action will dictate the remedy that will be involved. The inappropriate reliance on the CPO does not mean that the Sheriff could not continue its investigation and consider evidence it discovered that "buttressed" the facts alleged in the CPO. As a result, the new evidence discovered as part of its investigation is properly considered as it tended to buttress the allegation in the CPO. The premature nature of the CPO affects the remedy not the ability of the evidence acquired thereafter to be considered. That finding notwithstanding, the more significant fact is the Grievant's postdischarge conduct. Because of the holding that results from the Grievant's post-discharge conduct, the "after-acquired" evidence that was made following the discharge regarding pre-discharge conduct was only tangentially relevant.

Post-discharge conduct is often found to be irrelevant to a just cause determination. However, exceptions exist to this general rule. Exception has been made for post-discharge conduct that is "part of one connected whole" with the incident leading, to discharge Perini, M-K, Leavell, 4 LA 1044 (Merril 1966) and for conduct that 'flowed directly out of events surrounding the discharge and in a very real and dramatic sense, was an integral part of those events and merged with it." Publishers' Association of New York, 36 LA 706, 709 (Seitz,1961). In

this case, the position that the Grievant held supports a finding that his post-discharge conduct, namely his conviction for disorderly conduct, was properly considered.

As a police officer the Grievant was exposed to the problems of domestic violence daily. This included exposure to victims whose allegations were either true, partially true or totally false. In all of these circumstances where domestic violence is alleged as a criminal charge, and regardless of the truth of the allegations, the best conduct for every defendant to take is to avoid contact with the victim at all costs. This common sense approach is all the more necessary if the defendant in such a case determines that he wants to divorce the prosecuting witness. No individual should understand this axiom better than an officer.

Although these elements applied to the Grievant, he chose to act in a manner that resulted in a criminal conviction. Since the criminal conviction for disorderly conduct stemmed from an original charge of domestic violence alleged by Morrison, then it was directly related to the claims made in the CPO that was the basis for the discharge Since this post-discharge conduct was a direct result of continued contact with the same individual whose claims were the basis for his discharge, it was properly considered as flowing out of the events that lead to the discharge decision. Based on this finding, it must be found that the Grievant's post-discharge conviction is a proper consideration in determining whether he should continue being employed by the Sheriff.

Applying this finding to the just cause standard, it must be found that the Grievant's criminal conviction justifies his discharge. No police force can afford to have officers with criminal records on the force. It is reasonable to expect that if the public at large were to find out that police officers also had criminal records, the Sheriff, in an elected office, would not be Sheriff for very long. Moreover, not only was the criminal charge enough to justify discharge, the fact that the Grievant was on probation a s result of his sentence was proper to consider. It would be a serious problem for the Sheriff if the Grievant were to violate his probation while being employed and have to be locked up with some of the criminals he arrested. Such a reasonably forseeable situation is intolerable and supports a finding that just cause exists for the Grievant's termination.

This finding does not end the discussion. Even though the Grievant's discharge was justified, it must be determined what, if any, remedy is due because of the premature nature of his termination as well as the other procedural errors that existed. Since it has been held that the discharge was premature, it is necessary that the Grievant be given some back pay. Relying on the most objective fact that was submitted, it is fair and reasonable that the Grievant be given back pay from the date of his discharge to the date of the filing of the domestic violence criminal charge -- July 2, 1998. From July 2, 1998 until the date of conviction, September 10, 1998, the Grievant shall be treated as if he were on leave with vacation pay being provided. Thus, back pay shall only be made for this second period if any were earned. The Grievant shall be considered discharged from September 10, 1995 forward.

(2)

Supreme Court, U.S.
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NO. 04-1289

In The Supreme Court of the United States

TIMOTHY MORRISON,
Petitioner,

v.

RICHARD L. WARREN, ET AL.
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

RESPONDENTS BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW BY PETITIONER

1. Did the Sixth Circuit Court of Appeals err in holding that procedural due process is not warranted for persons who – in the Court's estimate – "cannot prevail" on the merits of an underlying claim, and are thus not deserving of a full and fair opportunity to be heard even if such a hearing is guaranteed by the Constitution?

2. Is procedural due process "absolute" in terms of affording some sort of hearing to a person deprived or facing deprivation of a constitutional right, as this Court has previously held, or is it relative to the individual circumstances and a court's or tribunal's estimate of the underlying merits or perceived "futility" of the individual case, as the Sixth Circuit has now held. In other words, is it proper to conflate the guaranteed "process" with the underlying "merits" of a case?

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RESPONDENTS' BRIEF IN OPPOSITION TO TIMOTHY MORRISON'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE AND FACTS

The Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio both set forth facts in support of their decisions in this matter.

Those Courts found that Petitioner Timothy Morrison ("Morrison"), while working for the Sheriff as a Deputy, became embroiled in a domestic dispute with his wife. As a result she obtained a Civil Protection Order ("CPO") against him and he was not permitted to carry a weapon while that order was in effect. As a result, the Sheriff's Department notified him that his employment would be terminated because of the CPO and a pre-termination hearing was held. He attended this hearing and admitted that the CPO was in existence but stated that he was seeking to have the Order set aside. The hearing officer found that due to the CPO he was unable to carry a weapon which was a requirement of his employment and upheld the decision to end his employment. This decision was grieved and the matter was arbitrated. In the meantime, the CPO was lifted. However, a subsequent disagreement with his wife led to domestic violence charges and he ultimately pled guilty to disorderly conduct.

The grievance arbitration hearing lasted for two full days at which time both the Sheriff and Morrison were permitted to submit evidence and cross examine witnesses. The Sheriff submitted his argument that the decision to fire Morrison was warranted, and that furthermore, Morrison's subsequent decision to plead

guilty to disorderly conduct precluded the Sheriff from bringing him back into the Sheriff's employ. Sheriff Warren[1] testified at the hearing and the arbitrator relied upon his testimony that he would have terminated Morrison if he had still worked for him when the disorderly conduct guilty plea was entered.

The arbitrator entered a 43-page decision.[2] It is important to note here that the Arbitrator spent a great deal of time and effort reviewing and analyzing the arguments of the employee herein. Only then did he issue his lengthy decision finding that although the collective bargaining agreement had not been followed in all respects as to the initial decision to fire this employee, resulting in a pre-mature firing, the remedy was not to reinstate him, but rather to give him back pay from the original date he was fired to the date when he would have been fired for the subsequent disorderly conduct conviction.

The Arbitrator did not find that the employer had violated his due process rights under the constitution of the United States or the State of Ohio. Rather he found that the terms of the labor contract had been violated and he entered his remedy accordingly. Morrison appealed the Arbitrator's decision to the Court of Common Pleas

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[1] Since the events in this case occurred, Sheriff Warren lost his reelection bid in November, 2000, and Sheriff Drew Alexander now serves as Sheriff in Summit County.

[2] The original Arbitrator's Opinion and Award was 43 pages long. The Petitioner has attached a portion of this decision in the Appendix (Pet'r App 55a-72a) of his Petition for Writ of Certiorari. However, the first 30 pages of said Opinion and Award have not been included in the portion submitted by the Petitioner.

but the union did not support this appeal and it was dismissed. The Court of Appeals for the Ninth District of Ohio upheld this decision. As such, the Arbitrator's award became final and the County paid Morrison the backpay as ordered by the Arbitrator.

Subsequently this action was filed in the United States District Court for the Northern District of Ohio alleging that Morrison did not receive due process as to his termination based upon his subsequent conviction for disorderly conduct - which occurred after he had been originally discharged.

Both the District Court and the Sixth Circuit Court found that he had received all process that was due under the Fourteenth Amendment to the United States Constitution. The Sixth Circuit did not find that he was not entitled to due process – but rather that he received the minimal due process necessary in this situation.

Morrison then filed his Petition for Writ in this Court. Respondent maintains that the Sixth Circuit Court properly found that Morrison received all process that he was due and urges this Court to deny the requested Writ.

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY HELD THAT THE ABBREVIATED DUE PROCESS PETITIONER RECEIVED WAS SUFFICIENT TO SATISFY THE DUE PROCESS CLAUSE PURSUANT TO THE BALANCING TEST SET FORTH IN THE PRIOR DECISIONS OF THIS COURT

Morrison contends that the Sixth Circuit decision effectively found that he was not entitled to due process or that due process would be futile in this case. This is simply not what the Court held. Rather, the Sixth Circuit Court applied the balancing test set forth by this court in *Mathews v. Elderidge*, 424 U.S. 319, 96 S.Ct. 893 (1976) and found that the abbreviated process Morrison received was sufficient under the facts of the case.

It is implicit in the multitude of cases on the issue of procedural due process, that "due process is flexible" calling for "such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334, *quoting Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2592, 2600, (1972).

Moreover, in determining whether abbreviated due process may be justified, three factors should be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

> finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. 335, 96 S.Ct. 903.

The Sixth Circuit Court determined that the due process Morrison received for the discharge based upon his subsequent conviction was extremely abbreviated. They noted however that Morrison did not, and could not, "allege that he was not given an opportunity to respond to the evidence during the two-day arbitration". (Pet'r App 13a). Applying the factors of the Matthew's balancing test the court determined that the abbreviated process Morrison received constituted a "sufficiently meaningful opportunity to satisfy due process requirements." (Pet'r App 14a). Petitioner argues that the Sixth Circuit Court incorrectly applied this test by finding that the process would have been futile. That is not what the court found.

In determining whether there would be a violation of private interests or a risk of an erroneous deprivation the Court relied upon the arbitrator's decision. The Arbitrator found the Sheriff's testimony to be credible and relied upon that testimony in making his decision. The crux of the testimony made good sense to the Court. The Sixth Circuit Court merely acknowledged these facts. No additional procedural safeguards would have changed the result. Finally, the Court acknowledged that the government's interest in upholding the abbreviated process was clear in light of the fact that the employee deputy had been convicted of breaking the law he was sworn to uphold.

Petitioner relies upon the decision in *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978) for his argument that due process rights cannot be overlooked despite the underlying merits of the case. However, the facts of the *Carey* case were that two students were suspended for 20 days from school with absolutely no opportunity to be heard on the underlying factual issues. In the case at bar, Morrison was given a two-day hearing to dispute the facts against him and presented witnesses to the arbitrator. Thus, the cases are factually inapposite.

In fact, the decisions of this court have held again and again that these cases do not arise in a vacuum. There are always facts and circumstances surrounding a claim of a deprivation of due process and the courts must weigh the facts to decide whether there has been a constitutional deprivation.

The Sixth Circuit Court did so in this case and held that Morrison received all of the process he was due. As such, this Court should deny the writ.

CONCLUSION

Based on the foregoing arguments, this Court must deny this writ. The Sixth Circuit decision does not conflict with this Court's precedent and is not likely to erode the meaning of due process. Moreover, the Sixth Circuit Court is not breaking new ground and creating or disregarding the law of the land. Their decision merely applied the law to the facts of this case as the caselaw requires them to do. For these reasons, this Court should deny the writ requested herein forthwith.

Respectfully submitted,

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